8-1700-3224-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by David Beaulieu
Commissioner, Department of Human
Rights,

Complainant,

v.

City of St. Paul,

Respondent,

and

St. Paul Fire Fighters Local 21,

and

Fowler_v._Berry, (the certified class
of minority persons in Fowler_v.
Berry),

Intervenors.

DISMISSAL ORDER

On March 30, 1994 an Order Granting Motion for Summary Disposition was issued. That Order approved Local 21's Motion for Partial for Summary Judgment and the City's Motion for Summary Judgment. In addition, it required Local 21 to execute the Stipulation of Settlement signed by all other parties by April 15, 1994 and required any person objecting to dismissal to file its objections and serve them on all parties by that date. On April 11, 1994, Local 21 filed a Stipulation for Settlement executed by all parties, including Local 21. Further, no objections to the dismissal of this action pursuant to the terms of the Stipulation of Settlement were filed within the time limit set forth in the

Order of March 30.

NOW, THEREFORE, based upon all the files, records and proceedings herein and consistent with the Order of March 30, 1994,

IT IS HEREBY ORDERED: That the above-entitled matter is hereby DISMISSED WITH PREJUDICE pursuant to the terms of a Stipulation for Settlement which is incorporated herein by reference.

Dated this 15th day of April, 1994.

/s/_Jon_L._Lunde_____
JON L. LUNDE
Administrative Law Judge

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Intervenors.

DISCOVERY ORDER

On January 19, 1994 the City filed a Motion for an order to compel Complainant to produce its expert, Dr. Sheldon Zedeck, for a deposition. On January 20, 1994, Complainant filed objections to the Motion. Among other things, the Complainant questioned the City's authority to compel its expert to come to Minnesota for a deposition or any authority requiring the state to pay the expenses involved in the deposition. On January 20, 1994 arguments on the Motion were heard. At that time, it was agreed that a telephone deposition could be taken. With respect to the cost of that deposition, the parties were given until January 26 to file further argument. Only the Complainant filed further argument. In its filing, Complainant reiterated its argument that the City, in the absence of manifest injustice, must pay a reasonable fee for the time Dr. Zedeck spends responding to the questions propounded to him by the City. Complainant indicated in its filing that it was not seeking compensation for the time spend by Dr. Zedeck preparing for the City's telephone deposition.

NOW, THEREFORE, Based upon all the files records and proceedings herein,

IT IS HEREBY ORDERED: The City shall pay Dr. Zedeck a reasonable fee for time spent in responding to its deposition.

Dated this 28th day of January, 1994.

/s/_Jon_L._Lunde_____
JON L. LUND
Administrative Law Judge

MEMORANDUM

Pursuant to Minn. Rules, pt. 1400.6600, when the contested case rules are silent, the Rules of Civil Procedure for the District Courts are followed in ruling on motions. Under Rule 26.02(d)(3) a party seeking discovery of the facts and opinions held by an expert witness whom another party will call at trial must pay the expert a reasonable fee for the time spent in responding to discovery in the absence of manifest injustice. The City failed to establish that it is unjust to require it to pay Dr. Zedeck a reasonable fee for the time he spends responsing to the City's deposition. Consequently, the City must pay him a reasonable fee for the time he spends in the deposition.

JLL

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Intervenors.

PREHEARING ORDER
CONCERNING_TESTING_SITE_INSPECTION,
WALKAROUND, TIMING DEVICES AND
DISCLOSURE OF TEST RESULTS

By Letter/Motion dated September 22, 1993, the City moved for an Order for the Administrative Law Judge and the parties to visit the test sites during the

administration of the two physical tests which are to be conducted in October.
Also, by Letter/Motion dated September 30, 1993, the Union requested, among other things, that the City be ordered to retain the services of a qualified independent contractor employing electronic timing devices to time each applicant's performance on the CTT. In addition, the Union requested an order
requiring the City to compile, file with the Administrative Law Judge, and serve each party with a list showing each applicant's name and the applicant's
CTT total time. Further, the Union requested that the City be ordered to instruct applicants how to take the CTT and how applicants will be scored and ranked. The two Motions were heard during a telephone conference held on October 6, 1993. All the parties were given an opportunity following the telephone conference to submit proposed instructions regarding the manner in which applicants should perform the CTT and the 1.5 mile run, and various suggestions were filed with the Administrative Law Judge.

Based upon all the files, records and proceedings herein, and for the reasons set forth in the Memorandum appended hereto,

IT IS HEREBY ORDERED:

1. Counsel for the parties may view the administration of the test the City will administer to applicants on the following dates:

a. On October 20, 1993, between 10 a.m. and 12 noon to observe CTT
testing; and

b. On October 27, 1993, between 10 a.m. and 12 noon to observe the
1.5 mile run.

2. The City shall make available a vantage point from which to view the
test as it is being administered during the time period set forth in Paragraph
1. All persons viewing the test shall remain within or on that vantage point.
The vantage point shall be located so as not to interfere with the testing process, nor in any way effect the candidates who are taking the test. Counsel
for the parties may bring up to two consultants with them to view test administration. No party or accompanying consultant or counsel shall in any way interfere with the administration of the test or those candidates taking the test, nor shall they in any way communicate

3. The City may, if it desires, videotape any portion of the physical tests.

4. The City shall allow counsel for the parties and one consultant for each party to walk through the CTT course, with the administrator(s) of the test giving the instructions that they give to the candidates. The walk around

will take place at 7:40 a.m. on October 20, 1993 and shall not be delayed so as not to interfere with the scheduled start of the candidates' tests begining at 8 a.m. that day.

5. The City shall not be required to retain the services of an independent contractor employing electronic timing devices to time each applicant's performance on the CTT. However, the City may do so at its option.

6. The City shall compile, file with the Administrative Law Judge and serve on each party a list showing each applicant's name and the applicant's time on the CTT and the 1.5 mile run on or before November 24, 1993.

7. The City shall not be required to include any information in the envelope containing scheduling information mailed to applicants or to provide any particular instructions to applicants regarding the manner in which they should perform the CTT or the manner in which the candidates' performance will be scored and ranked.

8. The Union's Motion to compel the City to inform candidates how they are to perform the test--that is, their speed and best ability--and the language of civil service rules concerning scoring and ranking is DENIED.

Dated this 8th day of October, 1993.

/s/_Jon_L._Lunde_____

JON L. LUNDE
Administrative Law Judge

MEMORANDUM

The parties should, at their option, be given an opportunity to view test administration. Such a review may be helpful to them in preparing for hearings on the test. Hence, the times proposed by the City for such a review have been incorporated in this Order. During the week that the CTT is being administered, the Administrative Law Judge will be out of the state. Consequently, no provision has been included covering his attendance.

Following the telephone conference held on October 6, 1993, the State suggested that the City provide the parties with a "walk-through" or walk-around of the test site. The City has agreed to provide that opportunity to the parties and provision for such a walkaround has, therefore, been included in this Order.

The Administrative Law Judge agrees that it is in the interest of all parties that accurate times be kept of each applicant's performance on the CTT

and the 1.5 mile run. Nonetheless, the Administrative Law Judge is not persuaded that the City's proposed use of stop watches should be prohibited. There is no evidence that stop watches do not provide sufficiently accurate information or that greater exactitude is needed. Nor is there any evidence to suggest that the City will not accurately time each applicant's performance. The test proposed in this proceeding is one that was developed by the City and one which it seeks to have approved. Hence, it is the City's burden to develop and administer a nondiscriminatory test. If it has determined that stop watches should be used, it makes that determination at its risk. The Administrative Law Judge will not "tinker" with the test developed by its consultants for the purpose of attempting to cure potential defects at the 11th hour.

The City did not object to the Union's request that it be required to compile, file with the Administrative Law Judge, and serve on each party a list showing each applicant's name and the applicant's total test times. The City indicated, however, that it could not have that information earlier than November 24, 1993. There is no evidence that the November 24 date proposed by the City is inappropriate or will be prejudicial to the parties. Under the cir

In its Letter/Motion of September 30, 1993, the Union also requested that the Administrative Law Judge require the City to instruct applicants to perform the CTT to the best of their ability and that the City inform each applicant of the provisions of Civil Service Rule 7, which requires that the names of applicants who pass the examination be placed on an eligible list in the order of the their examination scores. That Motion was denied in a separate communication from the Administrative Law Judge on the grounds that the City has discretion in determining, at its risk, what instructions should be given to applicants.

The basic theory underlying the test proposed by the City is that applicants should perform the physical test as fast as they reasonable can. Doing so is consistent with the proposal made by its consultants and the Administrative Law Judge will not therefore, specify the instructions that should be given, as they are part and parcel of the underlying test developed by its consultants.

The City and its consultants know what instructions are consistent with testing objectives and presumably will instruct applicants how to take the test so that it is performed in the manner contemplated by the test developer.

If scoring is discussed with applicants, the City must, however, as stated in ß 7 of the Prehearing Order dated May 24, 1993, inform applicants that the method by which passing scores are determined and candidates are ranked will be

decided in this proceeding. The Administrative Law Judge will not dictate the substance of the instructions given to applicants. The City may explain in the scoring and ranking methods proposed by the parties. It is recommended that nay instruction given be in writing to ensure uniformity.

JLL

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and

St. Paul Fire Fighters Local 21,

and

Fowler v. Berry, (the certified class of minority persons in Fowler_v. Berry),

Intervenors.

ORDER FOR THE HIRING OF
FIFTEEN FIREFIGHTER PARAMEDICS

On August 23, 1993 the City filed a Motion requesting an order authorizing it to hire 15 fire fighter paramedics under the Rule 17.C. of the Civili Service Rules. On September 13, 1993 the Union filed objections to the Motion. Oral arguments were heard on September 20, 1993 and later filings were made to clarify the parties' positions. Neither the Complainant nor the Fowler_v. Berry class object to the City's Motion.

Based upon all the files, records and proceedings herein, and for the reasons set forth in the Memorandum appended hereto,

IT IS HEREBY ORDERED:

1. The City's Motion to appoint up to 15 firefighter paramedics under Rule 17.C. should be and is GRANTED.

Dated this 29th day of October, 1993.

/s/_Jon_L._Lunde_____

JON L. LUNDE
Administrative Law Judge

MEMORANDUM

The City seeks authorization to appoint up to 15 firefighter paramedics under Rule 17.C. The Rule states:

> Transfer may be made from any public agency having a merit system to the classified service of the City of St.«Paul provided:
>
> (1) The department head where the vacancy exists justifies the need for the transfer, which justification must include unusual or special job qual
>
> (2) The employee to be transferred has current permanent or probationary status in a class of position at least equal to the position in which he is to be employed and meets the minimum qualifications as stated in the Commission's class specifications.
>
> (3) Rights, benefits, and seniority as an employee in the classified service will commence with the first day of employment by the City.
>
> (4) Sick leave accumulation may be transferred at the discretion of the department head but may not exceed what would have been earned as a City employee.

The City seeks approval to obtain the transfer appointment of up to 15 fire-

fighter paramedics because of a shortage of paramedics and firefighters in the fire department. The City indicated that it now has approximately 40 vacancies for firefighters and will have approximately 60 vacancies by the summer of 1994. Because of the number of vacancies which exist, the City has determined that it cannot take current firefighters and provide them with paramedic training. Furthermore, the City is unable to train new paramedics until November 1995 due to the fact that its paramedics are trained by Ramsey Hospital staff and training is only given annually in November. Under the circumstances, the City wants authorization to hire 15 firefighters from other jurisdictions under Rule 17.C. In making appointments under the rule, the City has agreed to make a concerted effort to recruit women firefighter paramedics. Ideally, the City stated that is should have a 123 paramedics to properly staff the fire department, but that it has only 77 at this time, leaving a shortage of 46 paramedics. The record shows that the percentage of women in the fire department is currently below the City's affirmative action goals.

The Union objects to the City's Motion because firefighters must have the "working ability to attain certification as a paramedic and to perform the duties thereof" under the firefighter job description and on the additional ground that there are a number of firefighters who are ready, willing, and able to be trained as paramedics. Hence, in the Union's view, there is no "unusual or special job qualification not otherwise available to" the City which would justify transfer appointments. The Union stated that there are at least 10 firefighters who have volunteered to attend paramedic training and whose request have been denied. Assuming that the Judge has authority to consider civil service issues, the Union's arguments are not persuasive. Because of the shortage of regular firefighters, the City is unable to put existing firefighters into training because they are needed in their current positions. Consequently, the City must hire firefighters from outside the department in order to retain a sufficient number of regular firefighters and still have a sufficient number of paramedics. Because firefighter paramedics from other jurisdictions are the only persons who can be hired to fill the public need, it is concluded that those firefighter paramedics from other jurisdictions have unusual qualifications not otherwise available to the department. The unusual qualification is the ability to immediately work as a paramedic without adversely reducing the City's fire fighting corps.

The Union also argued that the City's Motion is an attempt to circumvent the Collect Bargaining Agreement with it. The Union argued that under Article 10.6 the City must fill vacant paramedic positions using seniority principles and a bidding system. That argument must also be rejected because it is inconsistent with the plain language of Article 10.6. The first two sentences

of that Article state:

> The EMPLOYER and UNION recognized the principle of seniority. In the event of a job opening due to the promotion, transfer, demotion, retirement or de

Clearly, the City is authorized under the quoted language to determine if a vacancy should be filled by a lateral transfer. In this case, due to a shortage of firefighters, the City is not proposing to fill the paramedic positions by lateral transfer. Hence, the provisions in Article 10.6 are inapplicable and the transfer appointments the City proposes to make do not violate the collective bargaining agreement.

The Union also argued that the City's proposal circumvents civil service rules. The Union noted that the City's civil service system is based upon merit principles and requires the City to administer its personnel system on a merit basis. In the Union's view, the City's attempted use of Rule 17.C. undermines merit system principles set forth in the rules. That argument is not persuasive. The City is specifically authorized by Civil Service Rules to make the transfer appointments it is proposing to make. Further, the Union has failed to show how application of Rule 17.C. undermines merit system principles.

Finally, the Union argued that the City cannot use Rule 17.C. to achieve affirmative action objectives. In support of its argument, it cited the Ramsey County District Court's decision in St._Paul_Police_Federation_v._City_of_St. Paul. In that case the court held that a person's minority group or protected class status does not constitute an "unusual or special job qualification" for purposes of Rule 17.C., and the City was enjoined from continued action in furtherance of any interpretation of the rule which would equate a person's minority group or protected class status to an "unusual or special job qualification." The court's holding in that case is inapplicable here. In this case, the City is using Rule 17.C. to increase its corps of paramedics because it is unable, due to a shortage of firefighters, to train current firefighters as paramedics. The City is not attempting to use the Rule to achieve affirmative action goals.

When the City is in need of persons possessing unusual or special job qualifications it is not prohibited from considering its affirmative goals when recruiting or hiring under Rule 17.C. the District Court said as much, stating (p. 9.):

> For purposes of clarity, this decision of the Court should not be construed to prohibit the City of St. Paul from consideration of its affirmative action goals when recruiting or hiring pursuant to Rule 17C, just as those considerations attend routine hiring procedures. The availability of hire by all under Rule 17.C. must be paramount. . . .

In sum, because the City has an acute shortage of paramedics which cannot be timely cured by training firefighters already employed by the City, and cannot train current firefighters without jeopardizing public safety, it is concluded that firefighter paramedic from other jurisdictions have unusual or special job qualifications and the City's Motion should be granted. Using Rule 17.C. does not violate any provisions of the collective bargaining agreement between the Union and the City, as argued by the Union, and is not inconsistent with the Ramsey County District Court's recent decision regarding the use of Rule 17.C.

JLL

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Intervenors.

ORDER GRANTING
MOTION FOR INSPE

On November 15, 1993, Local 21 requested that the City make available, at the Union's expense, the training grounds, facilities and equipment used in administering the City's new physical abilities test. The City opposed the request at a prehearing conference held at the conclusion of a motion hearing on November 18, 1993. Complainant also opposes the request on the grounds that Local 21's access to City property would not serve any useful purpose and could lead to delays and issue confusion. On November 23, 1993 Local 21 filed a formal motion requesting an order for access to the test site and the use of test materials.

Based upon all the files, records and proceedings hearing and for the reasons discussed in the Memorandum to this Order,

IT IS HEREBY ORDERED:

1. Local 21's Motion for access to the test site and the property used in administering the test is within the scope of Rule 34.01(2), relates to information which is relevant to this action, will not be unduly burdensome or expensive, and is, therefore, GRANTED.

2. Local 21 shall reimburse the City for all reasonable expenses the City incurs in complying with this Order.

3. The administration of the test to incumbent firefighters must be scheduled at a time when all parties to this proceeding are available and may be administered only once.

4. Incumbent firefighters may practice the test. The practice schedule must be adopted and provided to all other parties.

5. The test must be administered promptly and no later than December 10, 1993 unless otherwise ordered.

6. Local 21 shall keep records regarding the instructions given to incumbent firefighters in preparing for and taking the physical abilities test and shall keep accurate records of the incumbent's performance.

7. Local 21 may videotape the incumbent's performance. Copies of videotapes made must be provided to other parties on request.

8. Any incumbents taking the physical abilities test may be deposed by the other parties and their physical fitness records must be made available upon request. Incumbents taking the test will be deemed to have waived any

privilege they have to records regarding their physical fitness which are in the City's possession.

Dated this _____ day of December, 1993.

_____
JON L. LUNDE
Administrative Law Judge

MEMORANDUM

Local 21 seeks an order permitting it access to the test site and materials utilized by the City when the physical abilities test was administered to applicants for firefighter positions. As indicated in its Motion, Local 21 seeks access to City property so that two or three incumbent firefighters can take the physical abilities test the applicants took in October. Local 21 pointed out that the City's videotapes show firefighters performing the test wearing typical turn-out gear. Applicants, on the other hand, usually wore gym shorts, running shoes, and head gear without masks down.

Local 21 wants to show incumbents performing the test. It pointed out that its proposed videotape of incumbents performing the test will be the only evidence of the incumbents' performance. Local 21 stated that its videotape of the incumbents will be offered to show that the City's test is valid and to support its arguments regarding the manner in which an applicant's performance should be scored.

Local 21's Motion is based the provisions of Minn.R.Civ.P. 34.01(2). The rule states that any party may serve on any other party a request:

> . . . (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling t

Local 21 correctly asserted that the provisions of Rule 34 are applicable in contested case proceedings pursuant to Minn. Rules, pt. 1400.6700, subp. 2 (1991).

The scope of discovery under Rule 34 is the same as that applicable to depositions. Jeppesen_v._Swanson, 243 Minn. 547, 68 N.W.2d 649 (1955). Discovery rules are to be broadly and liberally construed. Larson_v._IDS_No. 314, 305 Minn. 358, 233 N.W.2d 744 (1975); Anderson_v._Florence, 288 Minn. 351, 181 N.W.2d 873 (1970). Discovery is not without limits, however, and can't be used simply for the purposes of delay. Buysse_v._Baumann-Furrie_&_Co., 428 N.W.2d 419 (Minn. App. 1988). The purpose of Rule 34.01 is enable a party,

like Local 21, to obtain evidence about the size, quality, and functioning of property. Hence, Rule 34.01 authorizes an order which would permit Local 21 to inspect the test site and the equipment used, measure distances, or test timing devices, in order to obtain evidence regarding the validity of the test.

The Union does not, per se, propose to inspect the property, to measure it, to survey it, to take pictures of it, to test it, or sample it, but its request is equivalent to access permitted to test an operation on city property. The "operation" involved here is not an on-going business process. However, the only way to inspect or test the test that was administered on City property, is to make the test site and materials available. The Administrative Law Judge is persuaded that Local 21's access for that purpose is within the scope of Rule 34.01. Although Local 21's request is somewhat unique, neither the City nor the Complainant asserted that the request is outside the scope of Rule 34, and the Administrative Law Judge is persuaded that the request comes within the scope of that rule. In Morales_v._Turman, 59 F.R.D. 157 (E.D. Tex. 1972), for example, the court issued an inspection order authorizing experts in a juvenile rights case to participate in an observation study at certain institutions under state supervision.

The Administrative Law Judge also is persuaded that the data Local 21 seeks to obtain by administering the physical abilities test to incumbents is relevant. A mere videotape of their performance would serve little purpose. However, the incumbents' actual performance may well be relevant. The fact that the incumbents may pass the test may not be significant evidence supporting its validity, but the incumbents failure to pass the test or their differing times in performing it, would, for example, be relevant evidence regarding the validity of the test and the manner in which it should be scored.

Because entry upon a party's premises may create greater burdens and risks than the mere production of documents, one court has held that requests for inspection of property require close scrutiny of the need for access. Belcher v._Bassett_Furniture_Industries,_Inc., 588 F.2d 904, 908 (4th Cir. 1978). In that case, the court held, in an employment discrimination suit, that an inspection order should not be issued when it appeared that inspection would be of small utility, the information sought could be more easily determined using other discovery devices, and inspection would cause production breakdowns and raise safety issues. The court held that in determining whether to issue an inspection order the degree to which the proposed inspection will aid in the search for truth must be balanced against the burdens and dangers created by the inspection. Id. at 908. In this case, the proposed inspection will not create any burdens and dangers. The major disadvantage is that the

City will incur some expenses in complying with an inspection order. However,
the Union has agreed to pay all the City's reasonable expenses. Consequently,
apart from the time that may be needed to observe training or test administration, neither the City nor the other parties will incur any significant expenses. For these reasons and because the information the

Although the Administrative Law Judge is concerned about collateral evidence which may confuse the issues in this case or divert the parties' attention to marginally relevant evidence, he is persuaded that a full and complete record concerning the test should be available and that Local 21's Motion should be granted. If additional discovery by the Complainant or the City is necessary as a result of Local 21's administration of the test to incumbents, they may proceed to take that discovery and Local 21 shall answer any discovery request made expeditiously. It must make the incumbents taking the test available for depositions on short notice and must answer any interrogatories or document requests within ten (10) days.

JLL

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ORDER FOR PARTIAL
STAY WITH CONDITIONS

On October 29, 1993 an Order for the Hiring of Fifteen Firefighter Paramedics was issued. Under the Order, the City was authorized to hire 15 firefighter paramedics under Rule 17C of the City's civil service rules. Local 21 has requested that the Order be stayed until the Minnesota Court of Appeals decides its appeal. The City does not object to a stay provided that it is allowed to continue recruiting efforts until Local 21's appeal is resolved and Local 21 files a bond to protect the City from any losses it may sustain as a result of the appeal. The City's basic agreement to stay hiring only is also based upon the City's understanding that Local 21 will expeditiously file and pursue its appeal from the Order of October 29.

Based upon all the files, records, and proceedings hearing, and for the reasons set forth in the Memorandum to this Order,

IT IS HEREBY ORDERED:

1. The Order for the Hiring of Fifteen Firefighter Paramedics is hereby STAYED insofar as it authorizes the City to hire 15 firefighter paramedics. The City may, however, proceed with all recruitment and selection procedures short of hiring.

2. Local 21 shall proceed with its interlocutory appeal of the Order of October 29 with dispatch and, if it does not expeditiously proceed, this partial stay may be lifted on Motion by the City.

3. The Administrative Law Judge has no authority to require Local 21 to file a bond in connection with the partial stay of the October 29, 1993 Order and the City's request for a bond is DENIED.

Dated this 2nd day of December, 1993.

/s/_Jon_L._Lunde_____
JON L. LUNDE
Administrative Law Judge

MEMORANDUM

The City does not oppose Local 21's requested stay provided that it may continue with all prehiring procedures necessary to recruit and obtain up to 15 firefighter paramedics under Rule 17C and Local 21 expeditiously proceeds with its appeal. Local 21 does not object to those conditions. The Administrative Law Judge is persuaded, therefore, that a partial stay limited to a stay in the actual hiring of any firefighter paramedics recruited under Rule 17C should be issued, and that the stay should be conditioned upon a requirement that Local 21 expeditiously proceed with its appeal.

The City has requested that Local 21 be ordered to furnish a bond in the amount of $20,000 to

Minn. Stat. Þ 14.63 states that persons aggrieved by a "final decision" in a contested case may seek review of the decision by certiorari filed with the Minnesota Court of Appeals. The plain language of the statute is limited to "final" decisions. It does not apply to interlocutory orders. Furthermore, the rules of civil procedure for the district courts do not authorize an administrative law judge to require a party seeking interlocutory review to file a bond. Under Minn. Stat. Þ 14.64, judicial review under sections 14.63 to 14.68 must proceed in the manner provided by the rules of the Minnesota Court of Appeals. Section 14.64 does not state that Local 21's appeal must proceed in accordance with the requirements of the Minnesota Rules of Civil Procedure for the District Courts. Hence, any authorization to require a bond contained in Minn.R.Civ.P. 58.02 is inapplicable here. Furthermore, Rule 58.02 does not apply to interlocutory appeals to the Minnesota Court of Appeals. It states that a district court may order a stay of entry of judgment to hear and determine motions for new trials and other motions pending before the district court. Rule 58.02 is limited to stays of entry of judgment "upon a verdict or decision." The Order authorizing the City to recruit and hire 15 firefighter paramedics does not constitute a verdict or decision which would authorize the Administrative Law Judge to require Local 21 to file a bond.

Under Minn. Stat. Þ 14.65 stays of final decisions are specifically authorized. However, the statute does not authorize an agency or the Administrative Law Judge to require a bond in connection with the stay. In the absence of a specific statutory authorization, the Administrative Law Judge has no power to require a bond. Requiring bonds, like awarding attorneys fees,

must be specifically authorized by statute. The City has cited no statute authorizing the Administrative Law Judge to require a bond of Local 21 in connection with the partial stay ordered herein. Hence, if a bond is appropriate, the City should seek an order from the Minnesota Court of Appeals
for bond pending resolution of Local 21's appeal.

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Intervenors.

ORDER_DENYING
MOTION_TO_STRIKE
OBJECTIONS

On October 16, 1992, the City requested that its newly developed physical abilities test for firefighter applicants be approved. On October 19 and 30, 1992, Orders were issued requiring that any objections to the City's request be filed on or before November 23, 1992. In addition, it was ordered that a hearing to consider the objections would be held on November 30. On November 23, Complainant filed objections to the City's request. The City responded to the objections on November 30. At a prehearing conference on November 30, the parties were given an additional seven days to comment on the City's test and other matters. On December 11, 1993, Local 21 filed a response to the Complainant's objections arguing that they must be stricken on the grounds that the Attorney General does not represent any party in this case and that Complainant is estopped from objecting to the City's test. On December 23, 1992, Local 21 filed a Motion formally requesting an Order striking Complainant's objections. Discovery followed. Final arguments on the Motion were heard on November 18, 1993.

IT IS HEREBY ORDERED: That Local 21's Motion to strike Complainant's objections to the City's test be and the same hereby is DENIED.

Dated this _____ day of December, 1993.

/s/_Jon_L._Lunde_____
JON L. LUNDE
Administrative Law Judge

MEMORANDUM

A. Background

Local 21 has moved to strike the Complainant's objections to the City's test on two grounds. First, it argues that the Attorney General does not represent any party in this proceeding and cannot, therefore, file objections to the test. Second, it argues that Complainant is estopped from objecting to the test because a prior Commissioner had an agreement with Local 21 establishing a methodology for considering objections which the current Commissioner failed to implement. Because both Motions are based on similar facts, a brief historical synopsis follows.

On August 24, 1990, a decision was issued which invalidated a physical abilities test the City had used to hire firefighters. In the Order accompanying that decision, the City was prohibited from hiring any firefighters until it developed a new job-related test and submitted it to the Administrative Law Judge for approval. At this time, Stephen W. Cooper was

Commissioner of the Minnesota Department of Human Rights (Department). Alex Frank Gallegos was appointed Acting Commissioner of the Department on February 18, 1991. On March 6, 1991, he became the Commissioner. He remained the Commissioner without interruption until that fall. However, after July 1 he was on a leave of absence. Affidavit of Alex Frank Gallegos dated December 7, 1992 and filed December 11, 1992 (Gallegos Affidavit). He never resumed his duties after July 1, and a successor was soon appointed.

In June 1991, former Commissioner Gallegos and the president of Local 21, Gary Olding, orally agreed to a procedure for the development of a new physical abilities test. The City was not a party to the oral agreement. According to Gallegos, the oral agreement with Olding provided, among other things:

> A. The Department agreed that the city of St. Paul should employ Dr. Paul Davis to develop a new, non-discriminatory firefighter entrance and qualification test;
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> B. The Department would create a task force which would, in part, monitor the progress and development of a new firefighters entrance and qualification test. The task force would consist of the Human Rights
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> Commissioner, the St. Paul Fire Chief, the St. Paul Affirmative Action Director, the President of IAF, Local 21, and four female firefighters; and
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> C. In monitoring the development of the new entrance and qualification test, the task force would review Dr.«Davis' work and make suggestions with respect to non-discrimination.

Gallegos Affidavit at 3.

The agreement received a great deal of publicity. It was reported on the evening news on June 11, 1993. Ex. A and B of Local 21's November 8, 1993 Motion to strike. Newspaper articles regarding the agreement were published on June 12, 1993 in the St. Paul Pioneer Press and the Minneapolis Star Tribune. See Local 21's List of Witnesses, Summary of Testimony and List of Exhibits filed April 12, 1993. Both newspaper articles reported criticisms of the agreement by the Attorney General himself. Id. Former Commissioner Gallegos was disturbed by the Attorney General's criticisms. He felt that the Attorney General divulged information protected by the attorney-client privilege by publishing his disagreement with the settlement proposal. Consequently, former Commissioner Gallegos wrote to the Attorney General on June 12, 1993. In his letter, the former Commissioner

On June 14, 1991, Attorney General Humphrey responded to the former Commissioner. In his letter, the Attorney General indicated that he was empowered to reject the settlement proposal but would not do so. He stated, however, that the public had a right to know his misgivings regarding the settlement proposal. The Attorney General denied that he had breached the code of professional responsibility by making his thoughts public. The Attorney General also said that he saw no need to appoint special counsel to represent the former Commissioner. See List of Witnesses, Summary of Testimony and List of Exhibits filed April 12, 1993.

Shortly after the settlement proposal was announced, former Commissioner Gallegos went on a leave of absence. On and after July 1, 1991, he was no longer in charge of the Department. On July 11, 1991, David Beaulieu, was appointed Acting Commissioner. Subsequently, on October 28, 1991, he was appointed Commissioner. Although former Commissioner Gallegos indicated that his leave did not expire until December 6, 1991, it is clear that he was replaced long before then. According to former Commissioner Gallegos, he reviewed the terms of the settlement proposal with Commissioner Beaulieu and Union President Olding sometime prior to his departure from the Department. According to the former Commissioner, on or about July 10, 1991 Commissioner Beaulieu told them he would implement the terms of the agreement. Gallegos Affidavit. Commissioner Beaulieu denies making any such statements. See Affidavit of David Beaulieu appended to the Department's Exhibits and List of Witnesses filed May 17, 1993.

After former Commissioner Gallegos commenced his leave of absence, his successors reviewed a number of testing proposals made by ARA Human Factors, Inc. (ARA) which were developed by Dr. Paul O. Davis.

On July 2, 1991 one of ARA's early proposals was submitted to the Department for review. On July 10, 1991, Mary Hedges, Temporary Commissioner, wrote to Mark Robertson in the City's personnel department regarding the proposal. In her letter, Hedges she said that the proposal was not clear and understandable. She requested clarification and suggested that the City require clarification from ARA. See Complainant's Exhibits and List of Witnesses, Ex. D. Subsequently, on July 15, 1991, Commissioner Beaulieu wrote to Robertson regarding a clarifying memo Dr. Davis wrote on July 13. In his letter, Commissioner Beaulieu said that the proposal still was not understandable. He itemized concerns regarding the representativeness of subjects used to norm the test, the determination of cutoff scores, and scoring options. Id, Ex. A.

On July 18, 1991, the City accepted a revised proposal made by Dr. Davis on July 17. Commissioner Beaulieu did not have an opportunity to study and respond to Davis' July 17 proposal before it was accepted by the City. On July 24, Commissioner Beaulieu wrote to the Mayor and City Council advising them that the proposal the City had accepted was still unclear. Commissioner Beaulieu said that Dr. Davis was unwilling to discuss it with the Department's expert and that he could not endorse the proposal or participate in ongoing processes without clarification. Id, Ex. B.

On August 6, 1991 Beaulieu met with Dr. Davis and others to discuss the test. On August 12, Commissioner Beaulieu wrote to the Mayor and City Council.

In his letter, Commissioner Beaulieu said the test had strong points but was unacceptable because it had no methodology for setting a cutoff score and erroneously assumed that the fastest applicants were the best. He concluded by stating that if the City proceeded with Dr. Davis' most recent proposal, the Department would likely oppose it and that he saw no purpose in his continued consultation or participation in test development. Id, Ex. C and Beaulieu Affidavit. Thereafter, the Department apparently had no involvement in ARA's development of the firefighter test,

Local 21 has been unable to locate and provide copies of the settlement agreement Olding and Gallegos allegedly signed. The only document reflecting an agreement is a "Settlement Proposal." The Settlement Proposal is a draft of the agreement. It reads as follows:

1. The Department of Human Rights (DHR) and the Local 21 propose the City hire interim firefighters using the Phoenix firefighters test, as modified consistent with the brief filed by the Department of Human Rights.

2. Local 21 agrees to set up a firefighting exchange program with the Phoenix Fire Department, involving at least four women from the Phoenix Department and four men from the St. Paul Department. This program will be partially funded by Local 21. The female Phoenix firefighters assigned to St. Paul will serve as mentors and trainers to women to be tested by the St. Paul Department, and will work to facilitate the integration of women into the St. Paul Fire Department.

3. The DHR and Local 21 recommend that a task force will be created to monitor the progress of the hiring process of the St. Paul Fire Department, and to ensure that female firefighters are not subject to a hostile or intimidating environment. This task force will consist of the State Human Rights Commissioner [A.F. Gallegos], the President of Local 21 [Gary Olding], the St. Paul Fire Chief, the St. Paul Affirmative Action Director, Robert Mems (title), and a woman who has not yet been named. This task force will be created within one week of the approval by the St. Paul City Council of this proposal.

4. Local 21 will commit $5,000 toward the training of female applicants, for both the interim and permanent tests.

5. The Department and Local 21 recommend that the City hire consultant Paul Davis to develop a permanent test for the St. Paul Fire Department. Mr. Davis will consult with the task force and female firefighters from other fire

departments before finalizing the test. This test will be subject to the approval of the Administrative Law Judge.

6. The DHR and Local 21 agree to leave the following issues to the discretion of the Administrative Law Judge, and agree not to appeal the Administrative Law Judge's decisions:

   a. Whether the test will be pass/fail or banded.

   b. Whether a certain ratio of females to males will be hired as a result of the interim test.

See, Olding Deposition, Ex. 4.

The "Settlement Proposal" was subsequently modified by Olding and Gallegos. According to Gallegos it was agreed that the task force would have four female firefighters rather than one (Gallegos Deposition at 73, 94) and that the titles of persons on the task force but not their names were to be mentioned. Gallegos Deposition at 90. Also, the Union's obligation was limited to paying $5,000 towards the training of female applicants for the final test only. Id. at 91, Olding Deposition at 15. The parties intended that the task force would resolve disagreements as they arose and before the final test was designed. The parties hoped that any disagreements that arose could be resolved or compromised before the final test was developed. However, unresolved issues would be submitted to the Administrative Law Judge for a decision. If disputes arose, former Commissioner Gallegos said that the Administrative Law Judge's decision would be final and binding and that neither Department/Complainant nor the Union would appeal. Union President Olding equivocated on that point with regard to scoring. Olding Deposition at 39-44.

After the City filed a motion requesting authorizati

B. Attorney General's representation of Complainant.

The first issue raised by Local 21's Motion is whether the objections to the newly developed physical abilities test filed by the Attorney General in behalf of the Commissioner must be stricken on the grounds that the Attorney General does not and cannot represent any party in this proceeding. Local 21 argued that former Commissioner Gallegos discharged the Attorney General and his subordinates because the Attorney General publicly objected to the agreement between Gallegos and Olding and for allegedly breaching the attorney-client privilege between the Attorney General and Gallegos as Commissioner. In Local 21's view, former Commissioner Gallegos was authorized to discharge the Attorney General under Minn. Stat. Þ 363.05, subd. 1(4) (1990). The statute authorizes the Commissioner of Human Rights to employ attorneys deemed necessary and prescribe their duties. Local 21 argued that the Attorney General and his assistants are attorneys for the Department under Minn. Stat. Þ 363.121 and could, therefore, be discharged. Section 363.121 states that the "Attorney General shall be the attorney for the Department". Local 21's arguments on this point are not persuasive.

Under the plain language of Minn. Stat. Þ 363.121 the Attorney General must be the Department's attorney. Nothing in the statute authorizes the Commissioner to discharge the Attorney General if a dispute arises. Under Minn. Stat. Þ 8.06, the Attorney General, the Governor, and the Chief Justice of the Minnesota Supreme Court can authorize the appointment of special counsel. Without such and authorization, the Attorney General must represent the Department under section 363.121. No such authorization was obtained. Hence, the Administrative Law Judge is persuaded that the Commissioner could not "discharge" the Attorney General contrary to the plain language of section 363.121.

Section 363.05, subd. 1(4) does not authorize such a discharge. It applies only to attorneys "employed" by the Department. The word "employ" as used in the statute must have been intended to refer to attorneys "hired" by the Department. The Attorney General and his assistant are not employees of the Department and are not hired by the Department. Hence, the Administrative Law Judge is persuaded that section 363.05, subd. 1(4) is inapplicable to the Attorney General and his assistants. The statute merely authorizes the Commissioner to employ attorneys in the day-to-day administration of the Department under the Minnesota Human Rights Act. It was not designed to authorize the Commissioner, at his election, to permit departmental attorneys to handle the Department's litigation contrary to the clear language of section 363.121. Because the Attorney General could not be replaced as the Department's counsel in the absence of an authorization for the appointment of special counsel under Minn. Stat. Þ 8.06, neither the Attorney General nor his assistant in this proceeding were required to withdraw from this case under Rule 1.16 of the Minnesota Rules of Professional Conduct after former Commissioner Gallegos said they were discharged.

Local 21 also argued that the Attorney General's current representation creates a conflict of interest in violation of the Rules of Professional Conduct and is, therefore, unauthorized. Local 21 argued that the Attorney General's representation of the current Commissioner, David Beaulieu, violates Rule 1.9 of the rules of the professional conduct. The rule states:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
>
> (b) use information relating to the representation to the

Local 21 argued that Commissioner Beaulieu has taken the position that this matter was not settled in the manner stated by former Commissioner Gallegos. In its view, therefore, former Commissioner Gallegos' interests are adverse to those of current Commissioner Beaulieu, and the Attorney General's

office should not have agreed to represent Commissioner Beaulieu until consulting with and receiving former Commissioner Gallegos' consent. Because the Attorney General did not do so, and is allegedly "spending a significant amount of time attempting to undermine Commissioner Gallegos' position", the Union argued that former Commissioner Gallegos is not being afforded the protections provided to him under Rule 1.9. That argument is not persuasive.

Former Commissioner Gallegos has never been the Attorney General's client. Minn. Stat. Þ 363.121 specifically states that the Attorney General is the attorney "for the Department". In Humphry_on_Behalf_of_State_v._McLaren, 402 N.W.2d 535 (Minn. 1987) the court faced a similar issue. In that case, the Attorney General brought suit against the former executive director of the Public Employees Retirement Association (PERA) to recover public funds allegedly improperly paid to him during his tenure. The former executive director argued that the Attorney General was barred from representing PERA under Rule 1.9. The court rejected that argument. Among other things, the court noted that the former executive director was never a client of the assistant attorney general involved. It stated that the special assistant attorney general's client had always been the association and its board of trustees. The court noted that Minn. Stat. Þ 353.08 plainly stated that the Attorney General was the legal advisor of PERA's Board of Trustees. As in the McLaren case, the Attorney General never was former Commissioner Gallegos's attorney. Rather, the Attorney General always has represented the Department.

Local 21 also argued that the Attorney General's current representation of the Department is barred under Rule 1.9(b) because a lawyer is prohibited from knowingly using a client's confidences or secrets to the client's disadvantage under Rule 1.6. According to Local 21, the Attorney General is now attacking former Commissioner Gallegos by contending that no settlement was reached and the Attorney General's position is, therefore, clearly adverse to Commissioner Gallegos for purposes of Rule 1.9(b). Local 21 believes, therefore, that the Attorney General's current representation of the Department is unauthorized. There is no evidence that the Attorney General is using any "confidences" of former Commissioner Gallegos.

Also, because former Commissioner Gallegos never was the Attorney General's client, Rule 1.9(b) is not applicable and is not violated if the current Commissioner takes a position different from the former Commissioner. In Humphry_on_Behalf_of_State_v._McLaren, supra, 402 N.W.2d at 540, the court stated:

> Ordinarily, an attorney representing a corporation or other organization has no conflict of interest in representing the corporation against an officer or employee on a corporate matter. The attorney's allegiance is to the organization. An organization's employee has, of course, a personal stake in his or her job, but in conferring with the organization's attorney in the performance of that job, the matters conferred on are the legal business of the client organization. Whatever information about the organization the officer employee

> may disclose to the organization's attorney would be information the organization is entitled to know. . . .

Here, the Attorney General's client is and always has been the organization --the Minnesota Department of Human Rights. Neither the current Commissioner nor the Attorney General, are precluded from taking a position adverse to form

The Union cited People_Ex_Rel._Deukmejian_v._Brown, 172 Cal. Rptr. 478, 624 P.2d 1206 (Cal. 1981) to support its arguments. In that case, the California Supreme Court held that the state's attorney general could not be compelled to represent state officers or agencies if the attorney general believed them to be acting contrary to law, and that the attorney general may withdraw from his statutorily imposed duty to act as their counsel. However, it went on to hold that the Attorney General may not, after withdrawing, take a position adverse to his former clients by suing them in court or taking a position adverse to them. Id. at 1209. In this case, the Attorney General has not taken a legal position adverse to that taken by former Commissioner Gallegos or that taken by the current Commissioner. Hence, the cited case is inapplicable.

Finally, Local 21 argued that the Assistant Attorney General as well as the Attorney General cannot file objections to the City's test under Rule 3.7(a) of the Rules of Professional Conduct which generally states that "a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." Assuming that Attorney General or Assistant Attorney General, Erica Jacobson, are necessary witnesses, the entire Attorney General's staff would not be disqualified from representing the Department in filing objections to the City's test. Humphry_on_Behalf_of_State_v._McLaren, supra, 402 N.W.2d at 542. If either the Attorney General or the Assistant Attorney General will likely be necessary witnesses they cannot appear as counsel in this proceeding, but another assistant could. However, Local 21 failed to show that either's testimony is "necessary" for purposes of Rule 3.7.

Neither the Attorney General nor the Assistant Attorney General offered testimony contrary to that presented by former Commissioner Gallegos. They merely answered discovery served upon them by the Union relating to their knowledge of a settlement agreement and the whereabouts of a copy of that agreement. Neither of them have any peculiar knowledge of the facts and circumstances surrounding the existence or terms of the agreement. The Administrative Law Judge is persuaded, therefore, that no violation of Rule 3.7(a) was established. Even if that were not so, disqualifying the Assistant Attorney General would work a substantial hardship on the Department. This has been a lengthy and complex proceeding. If the Assistant Attorney General were removed, significant delays might result to the prejudice of all parties. Because it would inappropriate to disqualify the Assistant Attorney General under Rule 3.7(a)(3), her continued participation in filing objections to the City's test on behalf of the Department cannot be considered improper or unauthorized.

C. Estoppel

Local 21 argued that the Department is estopped from objecting to the test developed by Dr. Davis because it failed to assemble the task force former Commissioner Gallegos and Union President Olding agreed the Department would establish to monitor the development of the test. Under the terms of that agreement, the Department was to establish a task force to review Dr. Davis' proposals and make suggestions regarding the development and content of the new physical abilities test. The Department did not set up a task force to perform those functions as former Commissioner Gallegos agreed to do. The Union's position is that its failure to establish the task force estops it from now challenging the substance of the physical abilities test that was developed.

Complainant has not denied that a settlement agreement was signed, that the agreement was publicly announced, and that the agreement required the Department to create a task force. In addition, it does not deny that no task force was created, and it did not assert that the Commissioner was not authorized to enter into the settlement agreement allegedly reached.1 Hence, none of those issues need

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1. The Commissioner has authority to settle contested cases commenced under the Minnesota Human Rights Act pursuant to Minn. Stat. ÞÞ 363.05, subd. 1(10) and 14.59 and Minn. Rules, pt. 5000.0800, subp. 3 (1992). The Attorney General, however, also has extensive-common law powers inherent in his office regarding litigation conducted for the state. Dunn_v. Schmid, 239 Minn. 559, 60 N.W.2d 14 (1953); Slezak_v._Ousdigian, 260 Minn. 303, 110 N.W.2d 1 (1961). It has been held that the Attorney General has plenary discretion in determining what litigation will be prosecuted in the name of the state. State_v._City_of_Frazer, 254 N.W. 776 (Minn. 1934). Some courts have held, however, that an attorney general cannot compromise claims without the consent of administrative officers having executive control of specified programs. See e.g. Robinson_v._State, 63 N.W.2d 521 (N.D. 1954).

In its initial Motion, filed on December 31, 1992, Local 21 cited the decision in United_States_v._State_of_Louisiana, 751 F.Supp. 608 (E.D. La. 1990) in support of its argument that the Department as well as the Attorney General are estopped from raising objections to the test Dr. Davis developed. However, that case involved the doctrine of "judicial estoppel."2 At the hearing, Local 21 asserted that its Motion to strike the Complainant's objections is based solely on principles of equitable estoppel. Hence, the doctrines of judicial estoppel and promissory estoppel will not be considered except insofar as they may be relevant under the principles of equitable estoppel.

In Ridgewood_Development_Co._v._State, 294 N.W.2d 288 (Minn. 1980) the Minnesota Supreme Court reiterated its earlier holding in Mesaba_Aviation Division_v._County_of_Itasca, 258 N.W.2d 877 (Minn. 1977) that the government

may equitably estopped in an appropriate case. The court recited the traditional elements of estoppel stating that "the plaintiff must demonstrate that the defendant, through his language or conduct, induced the plaintiff to rely, in good faith, on this language or conduct to his injury, detriment, or prejudice." Ridgewood, supra, 294 N.W.2d at 292. It also cited its previous statements in Mesaba that when the government is to be estopped, '"the equities
of the circumstances must examined and the government estopped if justice so requires, weighing in that determination the public interest frustrated by the
estoppel"' Id. at 291-92. It also reiterated its statements in Mesaba that before estoppel will lie against the government the equities advanced by the individual asserting them must be "sufficiently great" and that a plaintiff asserting estoppel against the government has a heavy burden of proof. Id. at
291-92. In addition, the court stated that the government must chargable with
some wrongful conduct if it is to estopped. Id. at 292-93. It held, therefore, that in determining whether estoppel lies against the government, the court must first look for the government's wrongful conduct, and only if wrongful conduct exists does the balancing process begin. Id. at 293.

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2. Judicial estoppel is a doctrine which bars a party form assuming inconsistent or contradictory position in litigation. 31 C.J.S., Estoppel
Þ 117b. See also Reilly_v._Bader, 46 Minn. 212 48 N.W. 909 (1891). In one case, the court held that a party that took full advantage of a stipulation by his counsel was estopped from denying counsel's authority to compromise his suit. Albert_v._Edgewater_Block_Building_Corp., 218 Minn. 20, 15 N.W.2d 460 (1944). It is an affirmative defense that must be
affirmative pleaded. Sports_Page,_Inc._v._First_Union_Management,_Inc., 438 N.W.2d 428 (Minn. Ct. App. 1989). It is usually held that the doctrine is applicable without a showing of reliance, injury or prejudice.
31 C.J.S., Estoppel, Þ 117b at 625-26.

Subsequently, in Brown_v._Minnesota_Department_of_Public_Welfare, 368 N.W.2d 906, 910 (Minn. 1985) the court stated:

> This court has described estoppel as --
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> > an equitable doctrine addressed to the discretion of the court and * * * intended to prevent a party from taking unconscionable advantage of his own wrong by asserting his strict legal rights. To establish a claim of estoppel, plaintiff must prove that defendant made representations or inducements, upon which plaintiff reasonably relied, and that plaintiff will be harmed if the claim of estoppel is not allowed.

> The government may be estopped if justice requires, but this court has said that it does not "envision that estoppel will be freely applied against the government." To estop a government agency, some element of fault or wrongful conduct must be shown. A plaintiff seeking to estop a government agency has a heavy burden of proof. When deciding whether estoppel will be applied against a government, the court will weigh the public interest frustrated by the estoppel against the equities of the case. [citations omitted].

Based upon these cases, the elements of an estoppel claim asserted against the government consist of the following:

1. The government made representations or inducements, or remained silent when it had a duty to speak;

2. The person seeking to estop the government reasonably relied upon the government's representations, inducements or silence;

3. The person seeking to estop the government will be harmed if estoppel is disallowed;

4. The equities advanced by the individual seeking to estop the government are sufficiently great;

5. The government's action involves an element of wrongful conduct (affirmative misconduct); and

6. The equities in favor of the persons asserting estoppel outweigh the public interested frustrated by applying it.

The Administrative Law Judge is persuaded that Local 21 has failed to establish that the Department should be estopped from objecting to the test recently developed by the City. Local 21 showed that the former Commissioner had an agreement with Local 21 pursuant to which a task force would be created to monitory development of the City's firefighter test and, in reliance on that agreement, Local 21 did not appeal from the City's proposed use of the Phoenix test to hire firefighters in 1991. However, the City failed to establish that the Department engaged in wrongful conduct, that it has been significantly prejudiced, or that the equities in its favor outweigh the public interests involved in having the Department's objections considered.

Local 21 argued that the Department engaged in wrongful conduct by failing to implement the terms of the agreement. It noted that settlement agreements are as binding as contracts and that the law favors the settlement of disputed claims. These assertions have not been disputed. Nonetheless, affirmative

misconduct was not demonstrated. First, former Commissioner Gallegos' successor denied any knowledge of his responsibility to set up a task force. Although his assertions are disputed by former Commissioner Gallegos and by Union President Olding, a factual dispute on that point exists thereby making it inappropriate to grant Local 21's Motion at this stage of the proceeding. Further, once Commissioner Beaulieu determined that the Department's participation in the development of the test would serve no useful purpose, Local 21's officers' never talked to Beaulieu regarding the matter or informed
him of his obligation to create a task force.

Even if it is assumed that Comm

Finally, and most importantly, the Judge is persuaded that the equities in
Local 21's favor are substantially outweighed by important public interests. The City's firefighter test has been a matter of public controversy for many years. It is a matter of interest to the public, the City, firefighters and the Department. Eliminating the Department's participation at this stage would
remove from the case the only party interested in the administration of the important policies underlying the Minnesota Human Rights Act and could result in the approval of a test which is discriminatory. The public interest demands, at this stage, that the City's test be scrutinized before it is approved. Years of time and effort have been involved in challenging the old test and in preparing a new one. The City itself deserves some assurance that
the test is valid so that it does not end up in court again. As a practical matter, if the
Department's participation
is denied, nothing prevents any unsuccessful female applicant who took the newly developed test in October from filing a complaint with the Commissioner or from suing the City in District Court if not hired. At that point, all the
issues--and perhaps more--raised by the Union would be subject to litigation. That is a likely scenario, and would be highly prejudicial to the City, who would be exposed to additional monetary damages and penalties. Under the circumstances, the Administrative Law Judge is persuaded that the harm Local 21
suffered as a result of the Department's failure to set up a task force is significantly outweighed by important pubic policies and that the Department should not be estopped from presenting them in this proceeding under the equitable estoppel doctrine.

None of the decisions cited by Local 21 suggest that a different result is
appropriate. In United_States_v._State_of_Louisiana, supra, the court judicially estopped the Louisiana Attorney General from complaining about the governor's representation of the state due to the Attorney General's tacit acquiescence in the governor's involvement in the case. However, the court's decision did not deprive the state of its right to participate in the case as Local 21's requested order would do.

JLL